



March 23, 2007

ENGROSSED HOUSE BILL No. 1505

DIGEST OF HB 1505 (Updated March 22, 2007 11:44 am - DI 110)

Citations Affected: IC 20-12; IC 30-2.

Synopsis: Prudent management of institutional funds. Amends the Uniform Management of Institutional Funds Act to conform to the Uniform Prudent Management of Institutional Funds Act. Repeals nonconforming provisions. Specifies that certain records concerning alternative investments made by an institutional investment fund of a state educational institution are not subject to disclosure under the public records law. Specifies that certain information in such records is subject to disclosure and is not confidential financial information.

Effective: July 1, 2007.

Bardon, Foley, Micon
(SENATE SPONSORS — BRAY, SIMPSON)

January 23, 2007, read first time and referred to Committee on Financial Institutions.
February 15, 2007, reported — Do Pass.
February 19, 2007, read second time, amended, ordered engrossed.
February 20, 2007, engrossed.
February 26, 2007, read third time, passed. Yeas 99, nays 0.

SENATE ACTION

March 5, 2007, read first time and referred to Committee on Insurance and Financial Institutions.
March 22, 2007, amended, reported favorably — Do Pass.

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March 23, 2007

First Regular Session 115th General Assembly (2007)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2006 Regular Session of the General Assembly.

ENGROSSED HOUSE BILL No. 1505

A BILL FOR AN ACT to amend the Indiana Code concerning trusts and fiduciaries.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 20-12-1-13 IS ADDED TO THE INDIANA CODE
2 AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
3 1, 2007]: **Sec. 13. (a) Notwithstanding any other law, the following**
4 **records regarding alternative investments in which institutional**
5 **investment funds invest are not subject to disclosure under**
6 **IC 5-14-3, unless the information has already been publicly**
7 **released by the keeper of the information:**

8 (1) **Due diligence materials that are proprietary to the**
9 **institutional investment fund or the alternative vehicle.**

10 (2) **Quarterly and annual financial statements of alternative**
11 **investment vehicles.**

12 (3) **Meeting materials of alternative investment vehicles that**
13 **contain individual portfolio holdings.**

14 (4) **Records containing information regarding the underlying**
15 **portfolio positions in which alternative investment vehicles**
16 **invest.**

17 (5) **Capital call and distribution notices.**

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(6) Alternative investment agreements and all related documents.

(b) Notwithstanding subsection (a), the following information contained in records described in subsection (a) regarding alternative investments in which institutional investment funds invest are subject to disclosure under this chapter and are not considered a trade secret or confidential financial information exempt from disclosure:

(1) The name, address, and vintage year of each alternative investment vehicle.

(2) The dollar amount of the commitment made to each alternative investment vehicle by the institutional investment fund since inception.

(3) The dollar amount of cash contributions by the institutional investment fund to each alternative investment vehicle since inception

(4) The dollar amount, on a fiscal year-end basis, of cash distributions received by the institutional investment fund from each alternative investment vehicle.

(5) The dollar amount, on a fiscal year-end basis, of cash distributions received by the institutional investment fund plus the remaining value of partnership assets attributable to the institutional investment fund's investment in each alternative investment vehicle.

(6) The net internal rate of return of each alternative investment vehicle since inception.

(7) The investment multiple of each alternative investment vehicle since inception.

(8) The schedule of management fees and costs assessed by each alternative vehicle to the institutional investment fund.

(9) The dollar amount of cash profit received by institutional investment funds from each alternative vehicle on a fiscal year end basis.

(c) The following definitions apply throughout this section:

(1) "Alternative investment" means an investment in a private equity fund, real estate fund, venture fund, hedge fund, natural resource, or absolute return fund.

(2) "Alternative investment vehicle" means a limited partnership, limited liability company, or similar legal structure that is not publicly traded through which an institutional investment fund invests in portfolio companies.

(3) "Institutional investment fund" means a fund that consists

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of money managed in an endowment fund, including a quasi-endowment, and the returns on the endowment fund, that is held and invested by a state educational institution (as defined in IC 20-12-0.5-1).

(4) "Portfolio positions" means individual portfolio investments made by alternative investment vehicles.

SECTION 2. IC 30-2-12-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 1. (a) This chapter applies to an institutional fund in existence after June 30, 2007.

(b) For an institutional fund in existence before July 1, 2007, this chapter applies only to decisions made or actions taken after June 30, 2007.

SECTION 3. IC 30-2-12-1.3 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 1.3. As used in this chapter, "charitable purpose" means the following:

- (1) Relief of poverty.
- (2) Advancement of education.
- (3) Advancement of religion.
- (4) Promotion of health.
- (5) Promotion of a governmental purpose.
- (6) Any other purpose the achievement of which benefits the community.

SECTION 4. IC 30-2-12-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 2. As used in this chapter, "endowment fund" means an institutional fund, or any part of the fund, not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument. **The term does not include assets that an institution designates as an endowment fund for the institution's use.**

SECTION 5. IC 30-2-12-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 3. As used in this chapter, "gift instrument" means a ~~will, a deed, a grant, a conveyance, an agreement, a memorandum, a writing, or other governing document~~ **record**, including ~~the terms of~~ any institutional solicitations, ~~from which an institutional fund resulted~~ under which property is **granted** or transferred to or held by an institution as an institutional fund.

SECTION 6. IC 30-2-12-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 5. As used in this chapter, "institution" means any of the following:

- (1) ~~An approved institution of higher learning (as defined in IC 20-12-21-3) and its related foundations.~~

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(2) An organization that:

(A) is an exempt organization under Section 501(c)(3) of the Internal Revenue Code;

(B) has an endowment fund with a fair market value of at least ten million dollars (\$10,000,000); and

(C) is not a religious organization.

(3) A community foundation or trust:

(1) A person, other than an individual, that is organized and operated exclusively for charitable purposes.

(2) The state, including any agency or instrumentality of the state, or a unit of local government to the extent that the state or unit holds funds exclusively for charitable purposes.

(3) A trust that has only charitable interests, including a trust:

(A) that previously had both charitable and noncharitable interests; and

(B) the noncharitable interests of which were previously terminated.

SECTION 7. IC 30-2-12-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 6. ~~(a)~~ As used in this chapter, "institutional fund" means a fund held by an institution **exclusively for its exclusive use, benefit, or charitable purposes.** The term does not include the following:

(1) ~~Except as provided in subsection (b),~~ A fund held for an institution by a trustee that is not an institution.

(2) A fund in which a beneficiary that is not an institution has an interest, other than possible rights that could arise upon violation or failure of the purposes of the fund.

(3) Assets held by an institution primarily for charitable purposes and not primarily for investment purposes.

~~(b) The term includes a fund that is held exclusively for the benefit of a community foundation or trust regardless of the nature of the trustee or fiduciary.~~

SECTION 8. IC 30-2-12-6.4 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 6.4. **As used in this chapter, "person" means an individual, a corporation, a business trust, an estate, a trust, a partnership, a limited liability company, an association, a joint venture, a public corporation, the state of Indiana, a state agency or instrumentality, a unit of local government, or any other legal or commercial entity.**

SECTION 9. IC 30-2-12-6.7 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY

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1, 2007]: Sec. 6.7. As used in this chapter, "record" means information that is:

- (1) inscribed on a tangible medium; or
 - (2) stored in an electronic or other medium; and
- is retrievable in a perceivable form.

SECTION 10. IC 30-2-12-9 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 9. Section 8 of this chapter does not apply if the applicable gift instrument indicates the donor's intention that net appreciation may not be expended. A restriction upon the expenditure of net appreciation may not be implied from a designation of a gift as an endowment, or from a direction or authorization in the applicable (a) Subject to the terms of a gift instrument, an institution may appropriate for expenditure or accumulate so much of an endowment fund that the institution determines is prudent for the uses, benefits, purposes, and duration of the endowment fund. Except as provided in a gift instrument, the assets in an endowment fund are donor restricted until appropriated by the institution.

(b) In determining to appropriate or accumulate endowment funds, an institution shall:

- (1) act in good faith and with the care a prudent person acting in a like position would use under similar circumstances; and
- (2) consider the following factors:
 - (A) The duration and preservation of the endowment fund.
 - (B) The purposes of the institution and the endowment fund.
 - (C) General economic conditions.
 - (D) The possible effects of inflation or deflation.
 - (E) The expected total return from income and the appreciation of investments.
 - (F) Other resources of the institution.
 - (G) The investment policy of the institution.

(c) To be effective, a gift instrument must specifically state a limitation on the authority of an institution to appropriate or accumulate under subsection (a).

(d) A gift instrument that designates a gift as an endowment or contains a direction or authorization to use only income, interest, dividends, rents, issues, or profits, or to preserve the principal intact, or a similar direction:

- (1) creates an endowment fund of permanent duration unless the gift instrument states otherwise; and
- (2) does not otherwise limit the authority to appropriate or

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1 **accumulate under subsection (a).**

2 SECTION 11. IC 30-2-12-13 IS AMENDED TO READ AS
3 FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 13. (a) With the ~~written~~
4 consent of the donor **in a record, the governing board an institution**
5 may **modify or** release, in whole or in part, a restriction ~~imposed by the~~
6 **applicable in a** gift instrument on the ~~use or management~~, investment,
7 **and purpose** of an institutional fund.

8 (b) A release under this section may not allow an institutional fund
9 to be used for purposes other than the **charitable** purposes of the
10 institution affected.

11 (c) ~~This section does not limit the application of the doctrine of cy~~
12 ~~pres or the ability of the governing body through legal or equitable~~
13 ~~proceedings to obtain a release of a restriction in an applicable gift~~
14 ~~instrument.~~

15 (c) An institution may petition a court to modify, in a manner
16 consistent with the donor's intentions to the extent practicable, a
17 restriction in a gift instrument concerning the management or
18 investment of an institutional fund if the restriction:

- 19 (1) is impracticable or wasteful;
20 (2) impairs the management or investment of the fund; or
21 (3) due to unanticipated circumstances, the modification will
22 further the purposes of the institutional fund.

23 An institution shall notify the attorney general of a petition under
24 this subsection. A court shall provide the attorney general an
25 opportunity to be heard on the petition.

26 (d) An institution may petition a court to modify, in a manner
27 consistent with the gift instrument, the charitable purpose of a
28 fund or a restriction on the use of a fund if the charitable purpose
29 or use becomes unlawful, impracticable, impossible, or wasteful.
30 An institution shall notify the attorney general of a petition under
31 this subsection. A court shall provide the attorney general an
32 opportunity to be heard on the petition.

33 (e) If an institution determines that a restriction in a gift
34 instrument on the management, investment, or purpose of an
35 institutional fund is unlawful, impracticable, impossible, or
36 wasteful, the institution shall notify the attorney general. Not more
37 than sixty (60) days after providing notice under this subsection,
38 the institution may release or modify all or part of the restriction
39 if:

- 40 (1) the value of the institutional fund subject to the restriction
41 is less than twenty-five thousand dollars (\$25,000);
42 (2) the institutional fund was established more than twenty

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(20) years earlier; and

(3) the institution uses the institutional fund in a manner consistent with the charitable purposes expressed in the gift instrument.

SECTION 12. IC 30-2-12-14 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 14. (a) An institution that manages or invests an institutional fund shall consider the following:

(1) The intent of a donor expressed in a gift instrument.

(2) The charitable purposes of the institution.

(3) The purposes of the institutional fund.

(b) A person who is responsible for managing or investing an institutional fund shall:

(1) comply with the duty of loyalty imposed by any law; and

(2) manage or invest the fund in good faith and with the care a prudent person acting in a like position would use under similar circumstances.

(c) An institution that manages or invests an institutional fund:

(1) may only incur costs that are appropriate and reasonable in relation to:

(A) the assets of;

(B) the purposes of; and

(C) the skills available to;

the institution; and

(2) shall make a reasonable effort to verify facts relevant to the management and investment of the fund.

(d) An institution may pool two (2) or more institutional funds for purposes of management or investment.

(e) Subject to the terms of a gift instrument, an institution or person shall do the following:

(1) An institution that manages or invests an institutional fund shall consider the following factors:

(A) General economic conditions.

(B) The possible effects of inflation or deflation.

(C) The possible tax consequences of investment decisions or strategies.

(D) The role of each investment or course of action in relation to the overall investment portfolio of the institutional fund.

(E) The expected total return from income and the appreciation of investments.

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(F) Other resources of the institution.

(G) The needs of the institution and institutional fund to make distributions and to preserve capital.

(H) The relationship or value of an asset to the charitable purposes of the institution.

(2) An institution shall make management and investment decisions about an individual asset:

(A) in the context of an institutional fund's portfolio of investments as a whole and not in isolation; and

(B) as part of an overall investment strategy that has risk and return objectives reasonably suited to the institutional fund and to the institution.

(3) Except as otherwise provided in law, an institution may invest in any kind of property or type of investment.

(4) An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, due to special circumstances, the purposes of the institutional fund are better served without diversification.

(5) Within a reasonable time after receiving property, an institution shall:

(A) retain or dispose of the property; or

(B) otherwise rebalance the investment portfolio;

to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution.

(6) A person that has, or represents to have, special skills or expertise shall use the skills or expertise to manage or invest institutional funds.

(7) Notwithstanding any other provision in this chapter, an institution may retain property contributed by a donor to an institutional fund as long as the governing board of the institution considers it advisable.

SECTION 13. IC 30-2-12-15 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: **Sec. 15. (a)** Subject to the terms of a gift instrument and except as provided in any other law, an institution may delegate to an agent the management or investment of an institutional fund. The institution shall act in good faith and with the care a prudent person acting in a like position would use under similar circumstances in doing the following:

(1) Selecting an agent.

(2) Establishing the scope and terms of the delegation, subject

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1 to the purposes of the institution and the institutional fund.

2 (3) Periodically reviewing the agent's actions to monitor the
3 agent's performance of and compliance with the scope and
4 terms of the delegation.

5 An institution that complies with this subsection is not liable for the
6 decisions or actions of an agent to whom the management or
7 investment of an institutional fund is delegated.

8 (b) An agent shall exercise reasonable care to perform a
9 delegated function in compliance with the scope and terms of the
10 delegation.

11 (c) An agent that accepts the delegation of a management or
12 investment function from an institution submits to the jurisdiction
13 of Indiana courts in all proceedings concerning the delegation or
14 the performance of a delegated function.

15 (d) An institution may delegate management or investment
16 functions to its committees, officers, or employees as otherwise
17 provided by law.

18 SECTION 14. IC 30-2-12-16 IS ADDED TO THE INDIANA
19 CODE AS A NEW SECTION TO READ AS FOLLOWS
20 [EFFECTIVE JULY 1, 2007]: **Sec. 16. Compliance with this chapter**
21 **shall be determined in light of the facts and circumstances existing**
22 **at the time a decision is made or action is taken and not by**
23 **hindsight.**

24 SECTION 15. IC 30-2-12-17 IS ADDED TO THE INDIANA
25 CODE AS A NEW SECTION TO READ AS FOLLOWS
26 [EFFECTIVE JULY 1, 2007]: **Sec. 17. (a) Except as provided in**
27 **subsection (b), this chapter modifies, limits, and supersedes the**
28 **Electronic Signatures in Global and National Commerce Act, 15**
29 **U.S.C. 7001 et seq.**

30 (b) This chapter does not:

31 (1) modify, limit, or supersede 15 U.S.C. 7001(a); or

32 (2) authorize electronic delivery of a notice described in 15
33 U.S.C. 7003(b).

34 SECTION 16. IC 30-2-12-18 IS ADDED TO THE INDIANA
35 CODE AS A NEW SECTION TO READ AS FOLLOWS
36 [EFFECTIVE JULY 1, 2007]: **Sec. 18. In applying and construing**
37 **this chapter, consideration must be given to the need to promote**
38 **uniformity of the law with respect to its subject matter among**
39 **states that enact it.**

40 SECTION 17. THE FOLLOWING ARE REPEALED [EFFECTIVE
41 JULY 1, 2007]: IC 30-2-12-1.5; IC 30-2-12-4; IC 30-2-12-7;
42 IC 30-2-12-8; IC 30-2-12-10; IC 30-2-12-11; IC 30-2-12-12.

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COMMITTEE REPORT

Mr. Speaker: Your Committee on Financial Institutions, to which was referred House Bill 1505, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill do pass.

BARDON, Chair

Committee Vote: yeas 8, nays 0.

HOUSE MOTION

Mr. Speaker: I move that House Bill 1505 be amended to read as follows:

Page 3, line 32, delete "instrument and subsection (e)," and insert **"instrument,"**.

Page 4, delete lines 21 through 37.

Page 4, line 42, after "investment," delete "or" and insert **"and"**.

Page 5, line 14, delete "of investment" and insert **"or investment of the"**.

Page 6, line 27, delete "considered" and insert **"consider"**.

(Reference is to HB 1505 as printed February 16, 2007.)

BARDON

HOUSE MOTION

Mr. Speaker: Micon

I move that House Bill 1505 be amended to read as follows:

Page 1, between the enacting clause and line 1, begin a new paragraph and insert:

"SECTION 1. IC 20-12-1-13 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 13. (a) Notwithstanding any other law, the following records regarding alternative investments in which institutional investment funds invest are not subject to disclosure under IC 5-14-3, unless the information has already been publicly released by the keeper of the information:

(1) Due diligence materials that are proprietary to the institutional investment fund or the alternative vehicle.

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- (2) Quarterly and annual financial statements of alternative investment vehicles.
- (3) Meeting materials of alternative investment vehicles.
- (4) Records containing information regarding the portfolio positions in which alternative investment vehicles invest.
- (5) Capital call and distribution notices.
- (6) Alternative investment agreements and all related documents.

(b) Notwithstanding subsection (a), the following information contained in records described in subsection (a) regarding alternative investments in which institutional investment funds invest are subject to disclosure under this chapter and are not considered a trade secret or confidential financial information exempt from disclosure:

- (1) The name, address, and vintage year of each alternative investment vehicle.
- (2) The dollar amount of the commitment made to each alternative investment vehicle by the institutional investment fund since inception.
- (3) The dollar amount of cash contributions by the institutional investment fund to each alternative investment vehicle since inception
- (4) The dollar amount, on a fiscal year-end basis, of cash distributions received by the institutional investment fund from each alternative investment vehicle.
- (5) The dollar amount, on a fiscal year-end basis, of cash distributions received by the institutional investment fund plus the remaining value of partnership assets attributable to the institutional investment fund's investment in each alternative investment vehicle.
- (6) The net internal rate of return of each alternative investment vehicle since inception.
- (7) The investment multiple of each alternative investment vehicle since inception.
- (8) The schedule of management fees and costs assessed by each alternative vehicle to the institutional investment fund.
- (9) The dollar amount of cash profit received by institutional investment funds from each alternative vehicle on a fiscal year end basis.

(c) The following definitions apply throughout this section:

- (1) "Alternative investment" means an investment in a private equity fund, real estate fund, venture fund, hedge

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fund, or absolute return fund.

(2) "Alternative investment vehicle" means a limited partnership, limited liability company, or similar legal structure through which an institutional investment fund invests in portfolio companies.

(3) "Institutional investment fund" means a fund that consists of money managed in an endowment fund, including a quasi-endowment, and the returns on the endowment fund, that is held and invested by a state educational institution (as defined in IC 20-12-0.5-1).

(4) "Portfolio positions" means individual portfolio investments made by alternative investment vehicles."

Renumber all SECTIONS consecutively.

(Reference is to HB 1505 as printed February 16, 2007.)

MICON

COMMITTEE REPORT

Madam President: The Senate Committee on Insurance and Financial Institutions, to which was referred House Bill No. 1505, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

Page 1, line 12, delete "." and insert "**that contain individual portfolio holdings.**".

Page 1, line 13, after "the" insert "**underlying**".

Page 2, line 35, after "fund," insert "**natural resource,**".

Page 2, line 38, after "structure" insert "**that is not publicly traded**".

Page 5, line 11, after "appropriate" insert "**for expenditure**".

Page 6, line 1, strike "written".

Page 6, line 2, delete "," and insert "**in a record,**".

Page 6, line 14, delete "," insert "**to the extent practicable,**".

Page 6, line 41, delete "or" and insert "**and**".

Page 8, line 7, delete ";" and insert "**as a whole and not in isolation;**".

Page 8, between lines 26 and 27, begin a new line block indented and insert:

"(7) Notwithstanding any other provision in this chapter, an institution may retain property contributed by a donor to an

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institutional fund as long as the governing board of the institution considers it advisable."

and when so amended that said bill do pass.

(Reference is to HB 1505 as reprinted February 20, 2007.)

PAUL, Chairperson

Committee Vote: Yeas 9, Nays 0.

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